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No. 94-339

In The

Supreme Court of the United States

October Term, 1994

GENERAL ENVIRONMENTAL SCIENCE CORP.,

Petitioner,

vs.

FRANK L. HORSFALL, BIOSYS CORPORATION, GUSTAVO GYSLER, STEPHEN WALTERS, JASON C. BLACKFORD, THOMAS C. BUFORD,

Respondents.

On Petition For A Writ Of Certiorari To The United States Court of Appeals For The Sixth Circuit

REPLY MEMORANDUM IN SUPPORT OF PETITION FOR CERTIORARI

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INTRODUCTION

On August 23, 1994, petitioner General Environmental Science Corp. filed a petition for certiorari seeking review of a decision of the U.S. Court of Appeals for the Sixth Circuit vacating a default judgment and other sanctions entered by the district court in a theft of trade secrets case. The district court had premised its decision on Federal Rule of Civil Procedure 37 and its inherent power as set forth by this Court in its recent decision in *Chambers v. NASCO, Inc.*, 501 U.S. 32 (1991). The "Questions Presented" by the petition included whether a district court properly vacates sanctions against attorneys whose conduct it finds to be "egregious and sanctionable" without finding that such conduct was "substantially justified" or that an award of sanctions would be "unjust" as required by Rule 37.

Defendant-respondents have made no response to the petition. A response was filed by counsel for the attorney-respondents.

"CORRECTIONS" TO RESPONDENTS' STATEMENT OF THE CASE

Respondents, in their statement of the case, attempt to relitigate the factual determinations made by the district court, none of which the Court of Appeals found to be clearly erroneous. The district court made extensive factual findings relating to the misconduct of defendants' and defense counsel which formed the basis for the sanctions imposed. The district court found among other things that:

1) Despite the entry of a Court Order on September 14, 1991, "Horsfall and Strauss refused to answer deposition questions, refused to answer interrogatories, and failed to produce documents on the ground that to do so would violate Swiss law." (App. 95);

2) Despite the entry of a Court Order on April 4, 1991 requiring defendants to appear for deposition and comply with all discovery requests, "*Defendants' counsel* refused to provide dates for the depositions and informed Plaintiff's counsel that Defendants would not appear for deposition as

noticed. Defendants also failed to produce any documents or interrogatory answers as ordered." (App. 98);

3) "Although *defense counsel* represented to the Court at the time that the delay was caused by the difficulty of communicating with their clients due to the distance between Switzerland and Cleveland, Gysler testified that the real reason for the delay was that 'we did not feel that we were obliged to obey the order according to Swiss law.' " (App. 98);

4) On May 15, 1991, after GES filed a motion to compel compliance with the April 4, 1991, order, the "Court warned *defense counsel* that further intransigence on Defendants' part could lead to the imposition of ultimate sanctions." (App. 99);

5) On May 24, 1991, the district court entered an Order finding that defendants had violated the April 4, 1991 Order and imposing a sanction of attorney fees incurred by GES in prosecuting its motion to compel (App. 99);

6) That same day, May 24, 1991, *defense counsel* filed with the court under seal, rather than produce to GES, a document known as A7077 which *defense counsel* claimed would demonstrate that defendants' products "differ in type and kind" from the products of GES, their former employer. (App. 99-101). *Defense counsel Walters later admitted in a post-judgment affidavit that he knew that document A7077 could not be withheld from GES and that he did so at the urging of his client, Gysler.*

7) "*Defense counsel* refused to disclose Document A7077 despite repeated requests by GES counsel. . . . " (App. 101);

8) Horsfall admitted destroying the predecessor documents to document A7077 during the period when such documents were the subject of discovery requests by GES and while *defense counsel* was resisting production of such documents in the district court. (App. 102);

9) The district court found that the destruction of documents was prejudicial to GES. (App. 103);

10) The district court found that "Defendants have ignored and violated Court Orders with impunity. Defendants

have refused to produce Court ordered discovery." (App. 110);

11) The district court found that "the destruction of those documents was the result of either a bad faith scheme to destroy such documents or an intentional indifference to their discovery obligations." (App. 110);

12) "The destroyed documents apparently were the only primary scientific data tracing the development of Defendants' product line which they used to compete with GES." (App. 111);

13) "Defendants' conduct is much more egregious than that a issue in *National Hockey League*." (App. 115);

14) "*Counsel for defendants* are just as culpable [as defendants.] They too have displayed a willingness to frustrate and obstruct court orders." (App. 120);

15) "*[Defense] [c]ounsel* continued to rely on Swiss discovery procedures to object to deposition questions, interrogatories and document requests, despite the September Order rejecting the applicability of Swiss discovery procedures. . . . *Counsel's* persistence in resisting discovery on the basis of defendants' immunity under Swiss law delayed the production of documents and gave Defendants the opportunity to destroy documents." (App. 120);

16) *Defense counsel* had no basis to withhold document A7077 from GES and "the willingness of *defense counsel* to manipulate and fabricate facts to sustain whatever their current position might be is evidence of their bad faith." (App. 121).

17) "*[D]efense counsel* has, at every opportunity, resorted to whatever tactic is accommodative to delay this case, including attempts to trivialize Defendants' destruction of discoverable records." (App. 121); and

18) The district court relied on its authority under Federal Rule 37 and its inherent power to award attorney fees against defendants and defense counsel. (App. 122) (emphasis added).

The district court entered its order of sanctions against defense counsel on March 10, 1992 and defense counsel

obtained counsel to represent their individual interests, including at a pretrial and damages trial. After a final judgment was entered, defense counsel filed a motion for new trial with affidavits claiming that their withholding of discovery was solely attributable to their clients.

Defense counsel were represented by Marvin Karp, of Cleveland, who argued that the district court had denied defense counsel due process by basing its decision on evidence as to which defense counsel had not been heard and did not have notice. When Mr. Karp learned that this position was contradicted by the record, he withdrew it.

Mr. Karp argued that defense counsel acted appropriately because they had an ethical duty to zealously represent their clients. He never explained why defense counsel did not try to withdraw as counsel when they learned of defendants' unscrupulous conduct, nor did he explain why defense counsel did not attempt to defend themselves in a filing under seal whereby they could maintain the interests of their clients yet not perpetrate their fraud on the district court.

At a hearing on defense counsels' motion for new trial, Mr. Karp essentially admitted defense counsels' misconduct and pleaded with the district court to exercise "extraordinary compassion" (Tr. at 2), and to "do what is fair and what is right," even if such is "against the popular and majority view." (Tr. at 8). The district court expressed no doubts about its decision to impose sanctions. "As I look back on this litigation I think that I really did throughout employ the utmost judiciousness and stretch my patience to the very end in this case." (Tr. at 56). Despite noting its aversion to awarding fees against attorneys, the district court reflected that "usually the first thing lawyers do when they realize they might have exceeded the bounds of professional responsibility is to purge themselves of the client. Nothing like that in this case happened." (Tr. at 57).[1]

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[1] Mr. Karp also essentially admitted the misconduct of defendant-respondents, misconduct which he now attempts to characterize as proper. "Now I am not here to argue on behalf of the named defendants in this case. Judgment is rendered

When a month passed and no relief was forthcoming from the district court, Mr. Karp wrote a letter to Judge Battisti advising that defense counsel wanted to express their regrets for their behavior and telling the court that they promised not to do it again. (Record Entry 317). GES responded and noted that defense counsels' regrets at having been caught did not compensate GES for the prejudice caused by defense counsels' abuse, nor would vacating the sanctions accomplish the deterrent effect which this Court referred to in the *National Hockey League* case.

On September 16, 1992, the district court entered a two-page order granting defense counsels' post-trial motion and vacating the award of attorney fees. The district court gave no explanation for the order, did *NOT* vacate any of its prior findings of fact or conclusions of law, and made no finding that defense counsel's conduct was "substantially justified" or that the award of fees against defense counsel would be unjust. *However,* the district court did take pains to emphasize that it did not credit the affidavits submitted by defense counsel with their post-judgment motion, and had not changed its opinion of their conduct. The district court reiterated that "the 'factual' representations and arguments of law made by or on behalf of the attorneys leave much to be desired," and that defense counsels' conduct was "egregious and sanctionable." The district court did not adopt any of the extensive findings submitted by defense counsel.

On appeal, GES argued that the district court, having found defense counsels' conduct to be "egregious and sanctionable," did not have the discretion to impose no sanction, without finding that the textual prerequisites set forth in Federal Rule 37 had been met.

The court of appeals affirmed Judge Battisti's exercise of compassion in favor of defense counsel despite characterizing his September 16 Order as "doublespeak." (App. 35). The

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against them and the Court does have a long fuse, and I was impressed with the patience the Court displayed as to what had happened with respect to the defendants in this case . . . " (Tr. at 54).

court of appeals suggested that the findings would be sufficient and "determinative" if Judge Battisti had refused to vacate the sanctions (App. 35), and that a mere finding that conduct was "sanctionable" did not require the imposition of any sanctions (id. at 36). The court of appeals also relied on the notice argument asserted by defense counsel in the district court and then later withdrawn or "corrected". (App. 37).

Defense counsel also suggest that sanctions were inevitable simply because GES filed "repeated motions for discovery sanctions," and the district court "[u]ltimately" granted one. In fact, the record will demonstrate that the district court granted a series of discovery motions filed by GES and gave each one careful consideration and made detailed findings on each. In fact, Mr. Karp praised Judge Battisti for his "patience" in the case. Without the motions, there would have been *no* discovery in this case.

I. THE ISSUE PRESENTED TO THIS COURT FOR REVIEW DOES NOT INVOLVE ANY ASSESSMENT OF FACTS OR REVIEW OF DISCRETION BUT IS THE STRICTLY LEGAL QUESTION OF WHETHER A DISTRICT COURT MAY VACATE AN AWARD OF SANCTIONS WHEN IT FINDS CONDUCT TO BE "EGREGIOUS AND SANCTIONABLE" WITHOUT FINDING, AS REQUIRED BY RULE 37, THAT THERE WAS ANY JUSTIFICATION FOR THE CONDUCT OR FINDING THAT AN AWARD OF SANCTIONS WOULD BE UNJUST.

In order to thwart review, defense counsel suggest that this case presents solely an issue of fact and not any issue of law which would guide other courts in their application of discovery sanctions. In short, defense counsel are wrong. The district court made findings of fact which the court of appeals found would be "determinative" and require affirmance if the district court had not vacated its judgment in response to Mr. Karp's pleas. The issue presented for review is the strictly legal issue of whether a district court which finds conduct to be egregious and sanctionable may refuse to impose sanctions

which he determines to be necessary without articulating any prerequisite under Rule 37 for withholding sanctions. Under defense counsels' view, every issue of sanctions would be a factual one, and the reversal by this Court in *National Hockey League* would have been precluded.

In addition, defense counsel suggest that GES has misled this Court by stating that an award of fees is mandatory under Rule 37. The authorities cited, the advisory notes and case law, confirm that an award of fees is mandatory. GES agrees with defense counsel, as it did in the court of appeals, that the mandatory nature of the sanction may be avoided only upon a finding by the district judge that the offending conduct was substantially justified or that an award of fees would be unjust. *Neither the district court nor the court of appeals found that defense counsels' conduct was substantially justified or that an award of fees would be unjust.* Defense counsel did not argue in the district court that they qualified for any exception to Rule 37. They simply argued that their conduct was upstanding and that there was no basis for an award of fees. Accordingly, the district court did not and could not have held that defense counsels' conduct was substantially justified or that an award of sanctions would be unjust. Given that such argument was never presented to the district court, it is unreasonable to presume that the district court relied on such an unstated argument to vacate the award.

The district court found defense counsels' conduct to be "egregious and sanctionable," and gave no clue that it found the conduct to be substantially justified or an award of fees to be unjust. The district court, without making any findings, simply responded to Mr. Karp's pleas for compassion, and vacated the award. Pursuant to Federal Rule 37, such is insufficient, and this Court should hear this case or remand per curiam to assure that the district courts find the prerequisites required by Rule 37 before relieving a party from sanctions.

II. DEFENSE COUNSELS' CLAIMS OF LACK OF NOTICE RING HOLLOW IN LIGHT OF THE EXTENSIVE RECORD IN WHICH THE DISTRICT COURT LITERALLY BEGGED DEFENSE COUNSEL TO DEFEND THEMSELVES AND OFFER SOME BASIS ON WHICH HE COULD DECLINE TO AWARD SANCTIONS.

Defense counsel had sufficient notice of the claims against them, and their claims to the contrary are contrived to support the unsupported suggestions of the court of appeals.

On April 26, 1991, **nearly one year before the district court entered its award of sanctions against defense counsel,** GES filed a motion to compel which sought an award of attorney fees against defense counsel. Defense counsel were well aware of this because the basis for their extension of time to respond to the motion was the fact that the request for fees against defendants and defense counsel created a potential for conflict of interest. On May 1, 1991, defense counsel requested additional time to respond to Plaintiff's Motion for Sanctions "to clarify whether and to what extent conflicts may be raised by the nature of the motion to compel." (Record Entry 118). Likewise, in plaintiff's motion for sanctions filed on August 27, 1991, GES specifically argued for an award of fees against defense counsel. Accordingly, defense counsels' claim that they were not on notice is controverted by the record.

In addition to the correction filed by Mr. Karp in regard to his argument of lack of notice in the district court, the record of the November 26, 1992 hearing reflects multiple opportunities for defense counsel to defend themselves. Judge Battisti specifically requested "whether there is a need to determine whether the defendants' non-compliance was defendants' fault or his counsel's fault." (Tr. at 3). The court inquired, "[i]s it defendants, or defendants' counsel, or does it make a difference?" (*Id.* at 22). The court pressed further: "I need to know, I need to be able to somehow be able to

determine whether defendants' non-compliance was it defendants' fault, or whether it was counsel's fault." (*Id.* at 50). Counsel ignored the court's pleas.

Further, when defense counsel sought later to claim that they had not received a fair hearing, the district court cited his inquiries at the hearing and defense counsels' own recognition of a conflict. The court rejected defense counsels' request for a new hearing on April 7, 1992, holding that defense counsel had an opportunity to present evidence at the November 26 hearing and chose "[f]or whatever tactical reason" not to present a defense. (Record Entry 240 at 2-3). In addition, defense counsel made no effort to make any additional defense of themselves during the four months between the November 1991 hearing and March 10, 1992 when the district court entered his order of sanctions. Accordingly, defense counsel were given more than sufficient opportunity to defend themselves, and may not attack the district court's unretracted findings that their conduct was "egregious and sanctionable."

III. IT WAS NOT AN -ALTERNATIVE BASIS FOR AFFIRMANCE THAT THE DISTRICT COURT DID NOT TRACE THE SANCTIONS TO SPECIFIC VIOLATIONS OF RULE 37, SINCE SUCH RIGIDITY WAS SPECIFICALLY REJECTED BY THIS COURT IN CHAMBERS.

As GES established in its Petition at 23, this Court held in *Chambers* that when conduct is punishable under both the court's inherent power and under the provisions of a rule of civil procedure, an award of sanctions need not be tied to violation of a specific procedural rule or "broken down into its component parts." *Chambers,* 115 L.Ed.2d at 55 (Scalia, Justice, dissenting). Requiring a court to first apply the procedural rules "would serve only to foster extensive and needless satellite litigation. . . . " *Id.* at 49.

Further, even if the legal principle espoused by defense counsel were applicable, no basis existed for vacating the award of sanctions against defense counsel and the district

court found no such basis. Rule 37(b)(2)(C) provides for an award against the "party failing to obey the order or the attorney advising that party or both." There is no question that defendants disobeyed several court orders and defense counsel rose to their defense. The Court of Appeals did not find to the contrary. Accordingly, the prerequisites for an award of sanctions against counsel are met.

Defense counsel now also challenge the manner in which the district court calculated the fees to be awarded against defense counsel. Pursuant to *Chambers*, the district court assessed against defense counsel all attorney fees associated with the litigation. Likewise, under Rule 37, the district court concluded that the conduct of defense counsel rendered the case untriable, and that therefore, the entire costs of the litigation was a result of discovery failures or misconduct. Accordingly, the district court properly found that a monetary sanction against defense counsel should include attorney fees for the entire litigation.

CONCLUSION

For the reasons set forth above and in petitioner's original petition, the petition should be granted and this Court should permit full briefing of the issues to determine whether the discovery rules and sanctions for their violation mean what they say or whether they are subject to the unbridled ad hoc standards of the luck of the random judicial draw. Due process, notice and fairness ought not to depend on chance but can only be assured by enforcing the standards previously set to govern the conduct of officers of the court.

Respectfully submitted,

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